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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 517.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY and TEXARKANA AND FORT SMITH RAILWAY COMPANY,

Appellants,

v.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

APPEAL FROM UNITED STATES DISTRICT COURT FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

REPLY BRIEF OF APPELLANTS.

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REPLY BRIEF OF APPELLANTS.

I.

Defendants decline to support the lower court's conclusion that office cars are moved over foreign lines under published tariffs.

One significant feature of the brief filed by defendants is that they apparently have abandoned any effort to support the lower court's conclusion upon what we regard as the crux of the case. The basis of the lower court's decision, as we understand it, was its assumption that movements of office cars are covered by published tariffs, and that, therefore, office cars are moved by the transporting carrier in the performance of its common carrier duties. We refer to that part of the lower court's opinion reading as follows (R. 142):

> It is not necessary to consider what might be the law if railroad companies did not hold themselves

> out as common carriers of private cars. They do. They have established tariffs for the transportation of such cars. That is a part of their common carrier business.

But the defendants in their brief do not now contend that the movement of office cars is covered by any published tariff. On the contrary they concede that no published tariff exists or ever has existed. Counsel say (p. 36): "the decision of the lower court does not appear to be that carrier-owned private or office cars are covered by the tariffs." Their contention now is thus stated (p. 24): "The transportation free and without published tariff charge by one carrier * * * of the office car of another such carrier is not private transportation," etc. They assert (p. 29): "The violations of Section 6, of which appellants are guilty, are that they transported property without tariff charges on file for its transportation, and extended to persons privileges or facilities not named in their tariffs."

Not only, therefore, is there an absence of any effort on the part of defendants to support the lower court's conclusion that railroad companies hold themselves out as common carriers of office cars, but it now appears to be conceded that published tariffs do not now, and never have covered movements of such cars. By this concession, the main issue is narrowed to a comparatively small compass, which may be thus stated: Assuming that there is not now, and never has been, a tariff covering the movements of office cars, and that such movements in the past have always been made gratuitously on special request in each individual instance, as a matter of reciprocal accommodation, have such movements been made by the transporting carriers in their private carrier or common carrier capacity?

We gave our reasons in our original brief for our contention that the movement in the case assumed is strictly a private carrier movement. We now proceed, after answering a preliminary contention urged by defendants against the jurisdiction of the lower court, briefly to answer the arguments advanced by defendants in their brief, and to point out the inapplicability of the court decisions upon which they appear to rely.

II.

There is no merit in defendants' contention that the lower court was without jurisdiction of this action.

Defendants are not contending that the Kentucky suit is *res adjudicata* in the present action; nor are they complaining of the matter of venue; nor of the action of the lower court in refusing their application that the present action be stayed until a decision of the Kentucky suit.

Their sole insistence is that the lower court was without jurisdiction, that is, without power or authority to entertain the action and to render a decision therein. They contend that when the Kentucky suit was brought, that court thereby appropriated to itself exclusive jurisdiction of all causes of action that might be asserted by any of the many carriers of the country to set aside the order in question; and that after the filing of such action, all other carriers of the country must take their witnesses and lawyers to Kentucky, and present and litigate their causes of action in the Kentucky court, not as petitioners asserting their own claims as the law provides, but as interveners in that action; and this contention is made, notwithstanding the Urgent Deficiencies Act which in terms specifically

vests jurisdiction of an action of this nature in each and every district court in the United States, and notwithstanding its venue provisions permitting each carrier, in cases like the present one, to conduct its litigation at its own domicile.

Before considering the questions of law involved in defendant's challenge of the jurisdiction of the lower court, it is important to have in mind the nature of the Kentucky suit, as well as the nature of the present action; their points of difference in respect to the causes of action asserted, the parties asserting them, the evidence adduced in support thereof at the hearings in the courts below, and the extent of the relief prayed for.

The differences between the two actions are real and substantial.

In the Kentucky case, three grounds were asserted for challenging the Commission's order, which are thus stated by the Kentucky court:

> (a) . . . the plaintiffs argue that when a common carrier exercises its legal right to issue a pass to an officer or employee of another common carrier, or to members of their families, in exchange for a like courtesy, it has the right to transport such pass holder in whatever appropriate vehicle it may see fit to use; that it may haul such pass holder in one of its own cars, in a leased car, or in a car owned by the carrier of which the pass holder is an officer or employee, and lent to the moving carrier for the purpose of transporting the pass holder; that from whatever source the car may be obtained, it is a transportation facility of the moving carrier, and not an article of commerce for movement of which it must charge the owning carrier the published tariff rate.

(b) The plaintiffs further contend that the provisions of the Interstate Commerce Act, requiring the filing and publication of tariff schedules, and adherence thereto, and the provisions of Sections 2 and 3 of the Act, against unjust discrimination and undue or unreasonable preference, have no application to persons or property which the law permits to be moved free or at reduced rates.

(c) It is further argued that the alleged long-continued sanction by the Interstate Commerce Commission of the practice condemned in the order complained of constitutes a binding interpretation of the act as permitting the practice now condemned, and that Congress, in re-enacting the Act's provisions with reference to passes and reduced rates, has impliedly adopted such interpretation.

It will be noted that the first two grounds above mentioned constitute no part of the case made by the plaintiffs herein.

In the present case the grounds for the relief sought (in addition to (c), above stated, the argument of which is left to petitioners in the Kentucky case) are: (1) that the plaintiffs and other carriers have never held themselves out, by published tariffs or otherwise, as common carriers of office cars, and that the transporting carrier, in moving an office car, acts in the capacity of a private carrier, and, hence, the terms of the movements are properly governed by contract between the interested carriers who cannot be compelled to surrender their right of contract and to accept tariff schedules in lieu thereof; (2) that there was no evidence before the Commission sufficient to justify a finding by it that an office car movement of this nature was unduly preferential or unjustly discriminatory.

These two grounds for relief constitute no part of the case made by petitioners in the Kentucky suit.

Manifestly, the causes of action in the two cases are substantially different. The facts essential to the maintenance of one action would not support the other. "The true test of the identity of causes of action," says the court of appeals for the eighth circuit (*Union Central Life Ins. Co.* v. *Drake*, 214 Fed. 536), "is the identity of the facts essential to their maintenance." See, also, by the same court, *Harrison* v. *Remington*, 140 Fed. 385; *Munn* v. *Des Moines Nat. Bank*, 18 F. (2d) 269; *Pierce* v. *National Bank of Commerce*, 268 Fed. 487.

The only evidence introduced in the Kentucky suit in support of its petition was the record before the Commission. In the present action, in addition to the record before the Commission, oral testimony was introduced showing that plaintiffs and the other carriers of the country had never held themselves out by published tariffs or otherwise as common carriers of office cars; that such cars were moved over foreign lines only on special request in each instance, which request the foreign line was at liberty to grant or refuse in its discretion; and giving in detail the practice in respect to the movement of such office cars, the necessity therefor in railway operation, the advantages of the use of such cars, and covering the subject of office cars generally.

Furthermore, the relief sought in the Kentucky case is broader than the relief sought here. There it was based upon the asserted right of one carrier to transport free the private car or office car of another carrier, provided only that the car was occupied by pass holders—of whom there are more than 40 classes enumerated in paragraph (7) of Section 1—regardless of their relation to the owning car-

rier, and wholly irrespective of the purpose of their journey, or the nature of their employment during the journey.

The difference in the parties, in the causes of action, in the evidence, as well as in the relief sought, in the two cases is real and substantial.

It is said in defendants' brief (p. 14) that the petitioners in the Kentucky case sue "on behalf of themselves and all other carriers which might have an interest in the premises," etc. While the petition contains language of that nature, it is clear that the plaintiffs in the present case were not parties to the Kentucky suit, nor represented in it in any way whatsoever. The Commission in its answer in the Kentucky case specifically demanded strict proof that the petitioners therein were suing for or represented any other carriers. No evidence was offered upon this subject at the hearing. There is no finding by the court that any such representation existed. See *Hill* v. *Eagle Mfg. Co.*, 219 Fed. 719. Furthermore, a conclusive answer to any suggestion of representation consists of the fact that the plaintiffs herein, in February, 1930, while the Kentucky case was pending undetermined, brought the present suit, which was notice that they did not desire to be represented in or concluded by the decision rendered in the Kentucky case.

Plaintiffs were entitled to invoke the jurisdiction of the lower court, and were not required to assert their rights through intervention in the Kentucky suit.

The starting point of defendants' argument is not the Hepburn Act of 1906, which for the first time vested a statutory jurisdiction in the circuit courts to set aside or enjoin an order of the Commission, but the Commerce Court Act of 1910, by the terms of which such then existing

jurisdiction was concentrated in that court. They argue that when the jurisdiction of the commerce court was later re-distributed to the district courts, each of the district courts stepped into the shoes of the commerce court, with the latter's procedure for intervention by interested parties, and that, in some way not easily understood, the first suit brought in any such district court, *ipso facto*, ousted the jurisdiction of all other district courts in the United States to entertain suits relating to the same order, by whomsoever brought and on whatsoever causes of action. Thereafter all persons desiring to challenge the order in question must do so by intervention in the first suit. If, for illustration, two carriers—one in the state of Washington and the other in Florida—desire to contest an order of the Commission affecting both of them adversely, the Florida carrier, by bringing its suit first in the district court of that state, thereby deprives the district courts in Washington and in all other states of their jurisdiction, and forces the Washington carrier, as well as all other interested carriers, with different and, it may be, conflicting causes of action, to cross the continent with their witnesses and lawyers and assert their rights as interveners in the Florida suit; and *vice versa*. We contend that this view of the law finds no support whatsoever in the applicable statutes, and we proceed to state our reasons.

Instead of beginning with the Commerce Court Act, as defendants have done, we feel that it may be helpful to present a brief review of the history of the jurisdictional provisions relative to suits brought to set aside and annul orders of the Commission.

From the very beginning, the Commission was empowered to sue and to be sued in the federal courts. Where the necessary grounds of equitable relief were present, no

specific statutory provision was necessary to authorize a federal court, under its general equity jurisdiction, to entertain a suit against the Commission. That Commission was "a body corporate with legal capacity to be a party plaintiff or defendant in the federal courts" and its acts could be restrained if beyond the power which it could constitutionally exercise, or beyond its statutory power, or based upon a mistake of law, or if without evidence to support them (*Texas & Pacific R. Co.* v. *Interstate Commerce Com.*, 162 U. S. 197, 204; *Louisville & Nashville R. Co.* v. *Garrett*, 231 U. S. 298).

In the Hepburn Act of June 29, 1906, the rate-making power for the first time was conferred upon the Commission, by amendment of Section 15; and for the first time a penalty was prescribed for disobedience of the orders of the Commission, by amendment of Section 16. In view of these amendments it was realized by Congress that, in fairness to carriers, some provision should be made for a court review of the Commission's orders, and accordingly by that act the circuit courts were vested with statutory jurisdiction to hear and determine all actions to enjoin, set aside, annul or suspend any order of the Commission, with appropriate provision for the venue of such actions, as follows:

> The venue of suits brought in any of the circuit courts of the United States against the Commission to enjoin, set aside, annul, or suspend any order or requirement of the Commission shall be in the district where the carrier against whom such order or requirement may have been made has its principal operating office, and may be brought at any time after such order is promulgated. And if the order or requirement has been made against two or more carriers then in the district where any one of said carriers has its principal

> operating office, and if the carrier has its principal operating office in the District of Columbia then the venue shall be in the district where said carrier has its principal office; *and jurisdiction to hear and determine such suits is hereby vested in such courts.*

It is thus apparent that as early as 1906 each and every circuit court of the United States was vested with full and complete jurisdiction to hear and determine each and every action brought to enjoin, set aside, annul or suspend any order of the Commission. There is, in this legislation, no intimation that but one action is authorized in cases where separate causes of action are created in favor of several defendants in the proceedings before the Commission.

The venue provisions are significant. The suit challenging the Commission's order shall be brought in the district where the carrier has its principal operating office, or in the district where one of the carriers, if more than one are involved, has its principal operating office. The clear intention of Congress was that the litigation should be conducted, not in a remote part of the country where the first suit might be brought, but in a district convenient to the carrier or carriers bringing the action.

If the Act of 1906 had remained in force until the present day, unaffected by subsequent legislation, it is entirely clear that the district court in Kentucky, and the district court in Missouri, would each have possessed complete jurisdiction to hear and determine the two suits, respectively. Doubtless this will be conceded by defendants. It is our contention that the effect of the Urgent Deficiencies Act was to re-transfer to each of the district courts their original statutory jurisdiction first created in 1906 and afterwards concentrated in the commerce court; that the net result now, so far as jurisdiction is concerned, is

precisely the same as if the Act of 1906 had continued in effect without subsequent modification; and that the only change in procedure effected by the subsequent legislation and material here, was in giving an absolute right of intervention to those seeking to intervene, instead of the discretionary right theretofore existing.

In 1910 Congress deemed it advisable to concentrate in one court all actions to enjoin, set aside, annul or suspend an order of the Commission, and hence on June 18 of that year it created the commerce court, and vested it with the jurisdiction which the Act of 1906 had created in the various circuit courts. It was there provided:

> The commerce court . . . shall have the jurisdiction now possessed by circuit courts of the United States and the judges thereof immediately prior to June eighteenth, nineteen hundred and ten, over all cases of the following kinds: . . . Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

The concentration of all jurisdiction in the commerce court not having proved satisfactory, Congress, by the Urgent Deficiencies Act of October 22, 1913, abolished the commerce court and re-transferred its jurisdiction over actions to enjoin, set aside, annul or suspend orders of the Commission to the several district courts of the United States. The provision of the Act in that behalf is as follows:

> The commerce court . . . is abolished from and after December thirty-first, nineteen hundred and thirteen, and the jurisdiction vested in said commerce court by said act is transferred to and vested in the several district courts of the United States,

> and all acts or parts of acts in so far as they relate to the establishment of the commerce court are repealed.

The effect of this last act was to re-distribute to the district courts, and each of them, the plenary jurisdiction over all actions to enjoin, set aside, annul or suspend any order of the Commission, vested in the circuit courts by the Act of 1906, and later concentrated in the commerce court by the Act of 1910. The jurisdiction of the commerce court is "transferred to and vested in the several district courts of the United States." The effect of the act, says the Court in *Vicksburg, Shreveport & Pacific R. Co.* v. *Anderson-Tully Co.*, 256 U. S. 408, was "to redistribute the jurisdiction" of the commerce court.

The prior venue provision was modified to read as set forth in defendants' brief (p. 18), which requires actions challenging an order of the Commission to be brought in the judicial district "wherein is the residence of the party or any of the parties upon whose petition the order was made"; or "where the matter complained of in the petition before the Commission arises"; or "in the district where one of the petitioners in court has either its principal office or its principal operating office." Here, again, it is apparent that it was the intention of Congress that the litigation over orders of the Commission should be in district courts convenient to the parties. There is no intimation that carriers shall be required to conduct their litigation through intervention, at increased expense, in distant courts.

It is clear, therefore, that every district court of the United States is vested with full and complete jurisdiction over every action brought to enjoin, set aside, annul or

suspend an order of the Commission, and that the venue provision permits the litigation to be conducted, not in some remote part of the country, but in a district court convenient to the parties. Each and all of the carriers affected by the Commission's order in this proceeding, including the plaintiffs, were vested by the express terms of the statute with the right to challenge the validity of the order by suit in any district court of the United States, subject only to the venue provisions. Of course, the venue provision might be insisted upon or waived. Both the Commission and the United States, like other litigants, may waive or insist upon their rights under the venue provision at their pleasure (*Peoria R. Co.* v. *United States,* 263 U. S. 528; *United States* v. *Hvoslef,* 237 U. S. 1; *Thames & Mersey Ins. Co.* v. *United States,* 237 U. S. 19; *Commercial Casualty Co.* v. *Stone,* 278 U. S. 177).

Defendants attach an undue and unwarranted importance to that provision of the Commerce Court Act granting intervention as a matter of right, instead of as a matter of discretion. They argue that this is conclusive evidence of an intention on the part of Congress to create a contingent and shifting jurisdiction in the district courts. Their position appears to be that before the bringing of the first suit, each and all of the district courts have plenary jurisdiction; but that upon the filing of the first suit, a startling change takes place: there is an automatic repeal of the statutory grant of jurisdiction to all other district courts, together with a repeal of the venue provisions, enacted for the convenience of suitors; all other carriers must either forego their causes of action or present them, not by petition, as the law provides, but by way of intervention in the first suit.

But there can be no merit in this argument. When jurisdiction was concentrated in the commerce court, it

was appropriate to permit interventions as of right, instead of in the court's discretion, as had been the rule theretofore. Assuming that in the redistribution of jurisdiction to the several district courts of the United States this provision for intervention went along with it, there is no evidence of any intention on the part of Congress to qualify its grant of jurisdiction with any shifting or contingent provisions. To support defendants' argument it is necessary to read into the Act a proviso substantially in the following language:

> Provided, That the first suit brought in any district court shall have the effect of instantly depriving all other district courts of their jurisdiction over actions to contest the order in question; and provided further, that all other parties desiring to contest the order are required, notwithstanding the venue provisions, to assert their claims in such first suit, not by petition, as the act provides, but by way of intervention.

But the law contains no such proviso. If Congress had intended that there should be a proviso of this nature, it may safely be assumed that it would have said so in plain and unmistakable language.

Although every district court in the United States has jurisdiction of every action which might be brought by any railway company affected by the Commission's order in the office car case, it is not to be supposed that actions of this nature would be brought by the wholesale. Both the Commission and the United States may be relied upon to insist that actions be brought in the proper district, and timely objections to an inappropriate venue would be sustained as of course.

Nor is it to be supposed that unnecessary or vexatious suits would be brought. Courts possess an inherent power

to stay actions of that nature. The defendants themselves, in recognition of this inherent power of the lower court, appealed unsuccessfully to it to stay proceedings in the present case until a decision should be rendered in the Kentucky suit. If one suit presents all the contentions of the various carriers, with the expectation that it would be finally determined in this Court, if that course seemed desirable, doubtless all parties in interest would be satisfied, and no other action or actions would be deemed necessary. If several suits are brought in different districts the possibility of conflicting judgments is unimportant, since appeals lie direct to this Court.

It is entirely possible, however, that where many carriers are affected by an order of the Commission they may differ among themselves as to the basis of the action to be brought against the Commission, and the measure of the relief to be asked. The different grounds put forward in good faith by the two groups of carriers for the challenge of the Commission's order may be so inconsistent that they cannot properly be united in one action or asserted by way of intervention. The extent of the relief asked in one action may be broader than the relief which other carriers may feel themselves entitled to receive. Manifestly, if only one suit can be brought, the rights of some, perhaps many, carriers may be sacrificed.

The defendants contend that the plaintiffs should have intervened in the Kentucky suit. Aside from the fact that interventions are in their nature voluntary, and that they may not be forced upon unwilling parties, as held in *Adler* v. *Seaman,* 266 Fed. 828, 837 (C. C. A. 8), the plaintiffs could not, under well settled rules, intervene in the Kentucky case and there assert the rights which they are asserting here. An intervention, under Equity Rule 37, must be "in subordination to, and in recognition of, the pro-

priety of the main proceeding". As stated by the court of appeals for the eighth circuit in *Adler* v. *Seaman, supra,* intervenors "cannot challenge the propriety of the main litigation, but must accept it".

As before pointed out, the two actions, while having one point in common, are otherwise based upon different causes of action. The main basis of the Kentucky suit, for illustration, is the allegation, in paragraph 7, that a private car, when accepted by another carrier, "becomes *pro hac vice* and for the purposes of such movement the property of the carrier making the movement and rendering the service". The petition in the present cases takes the opposite view, alleging, in paragraph 10, that "such office cars do not become or constitute any part of the common carrier equipment of such foreign lines, and are not available for the general use of passengers traveling on such foreign lines". The allegations and the prayer for relief in the Kentucky case are, to some extent, inconsistent with the allegations and the prayer in the present case. For these reasons the plaintiffs in this case could not assert, by way of an intervention in the Kentucky suit, the rights which they claim herein.

Apparently, it makes not the slightest difference, in the view of the defendants' counsel, whether the first action is based upon a good or bad cause of action; nor whether it properly represents the claims and contentions of the other carriers affected by the order. If the first suit, for illustration, should be based solely upon the claim that the Interstate Commerce Act is unconstitutional, this claim, however ridiculous it might be at this date, and however much it might be disapproved by other carriers who conceived that they had meritorious grounds for successfully contesting the order, would nevertheless effect an exclusive appropriation of all actions to set aside the Commission's

order, subject only to the right of intervention, and oust all district courts of the United States of their jurisdiction to entertain any such action.

III.

Defendants are in error in their contention that the movement of an office car of another carrier is a violation of the act unless the movement is covered by a tariff published under the provisions of Section 6.

The lower court's conclusion, which was clearly the main ground of its decision, that published tariff provisions, in force at the time of the Commission's investigation, covered the movement of office cars, has not found favor with the defendants. They now take the opposite view, and insist that there were no tariff provisions covering such movements. And, this being conceded, it necessarily follows that there never have been any tariffs of that character.

Defendants now contend that the movement of an office car over a foreign line is a violation of Section 6 of the Act because there are no published tariffs covering such movement. The issue is thus practically narrowed to this one question. They say that the carriers of the country have been guilty of violations of Section 6 because "they transport property without tariff charges on file for its transportation, and extend to persons privileges or facilities not named in their tariffs."

Defendants' argument runs somewhat as follows: Section 6 (1) requires carriers to file and keep open to public inspection all rates and charges between points on their own lines and between points on their lines and the lines of

other carriers; Section 6 (7) prohibits the transportation "of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act"; the carriers of the country have failed to file tariffs covering the movement of office cars, and they have transported such office cars without such tariffs being on file; such office cars are "property", and hence tariffs should have been filed covering their movement; and the transportation of such office cars without covering tariffs is in violation of Section 6. But the argument, we respectfully submit, is wholly without merit since it merely begs the question in assuming that the movement of an office car is a common carrier movement, as distinguished from a private carrier movement, which is the real question for decision in the case.

As we have endeavored to point out in our original brief, the movement of the office car of another carrier in the circumstances disclosed in this record is a private carrier movement. This, as there stated, is true for two reasons.

In the first place, movements of office cars over foreign lines have always been without charge. The carriers performing the movement were carriers without hire. It is the universal rule that carriers without hire are not performing a common carrier service, but, on the contrary, they are private carriers or bailees without hire. The authorities and text writers supporting this proposition are cited in our original brief (p. 48). We are not advised of any decision to the contrary, and we deem further comment unnecessary.

In the second place, there being no tariffs covering movements of office cars, it necessarily follows that the

carriers have never held themselves out to the public as common carriers of office cars. There is no legally enforceable obligation upon carriers to accept and move office cars. When they are accepted and transported, it is only on special request in each individual instance, as a matter of reciprocal accommodation. These facts appearing in the record without contradiction conclusively establish that the movement of an office car is a private carrier movement. We need only to refer to the authorities cited in our original brief as full authority for this contention.

The transportation of an office car over a foreign line being a private carrier movement, as distinguished from a common carrier movement, as we believe has been abundantly demonstrated, the provisions of Section 6 relative to the publication of tariffs have no application whatsoever. The authorities and text writers cited in our original brief (p. 20) establish this contention.

The precise question was passed upon by this Court in *Terminal Taxicab Co.* v. *Kutz,* 241 U. S. 252. After reaching the conclusion that that part of the Taxicab Company's business which involved the hiring of automobiles from its central garage was a private carrier business, because "the bargains are individual", and hence there was no undertaking in favor of the general public, this Court held that there was no obligation on the part of the Taxicab Company to file its schedule of rates with the Public Utilities Commission, saying (p. 256):

> It follows that the plaintiff is not bound to give information as to its garage rates.

This Court, in *Santa Fe R. Co.* v. *Grant Bros. Co.,* 228 U. S. 177, 188, held that a railway company is a private carrier with respect to the transportation of cars contain-

ing the outfit of a construction company, and that a transportation charge less than tariff rates for similar transportation was "not obnoxious to the provisions of the law prohibiting departures from published tariffs, for the reason that such an agreement lies outside the policy of these provisions."

In *Segar* v. *Northern Pacific R. Co.*, 166 Fed. 526, it is held that state statutes prohibiting undue and unreasonable preferences to persons or localities with respect to any particular description of traffic have no application to transportation services performed by a carrier in its capacity as private carrier. It is said that these sections of the statute should be construed "as referring simply to such transportation service as the railroads of that state were or are required to perform for the general public in the discharge of their duties to the public as common carriers"; and that they "should not be held to embrace services which the common carriers of that state, as well as other states of the Union, have never been obligated to perform, but which they have rendered to the public from time to time under special contracts similar to the one here in question."

In *ex parte Alabama Great Southern R. Co.*, 206 Ala. 400, it is held:

> Code 1907, sec. 5522, requiring the schedules of a common carrier filed with the Railroad Commission to contain all charges for track and car service or rental, and for switching, demurrage, terminal, and transfer service, and for rendering any other service in connection with the transportation of passengers and property, refers to such rental and service as are to be performed in its capacity as a common carrier, and does

not extend to a charge made to a showman for parking his cars on the carrier's tracks for a period of 45 days, and it is entitled to make such charge, though not contained in its schedule.

In 10 C. J., sec. 759, it is said:

> Statutory provisions against unjust discrimination in rates have no application to services performed by the carrier which are outside of the scope of its duties as such. It has been so held in respect of a contract between a railroad company and a construction company for a reduced rate of transportation of men and materials required by the company in grading an extension and entered into in good faith, and of a contract for the transportation of a circus train providing that the carrier should furnish motive power, etc., and, in consideration of a reduced rate, should not be liable for injuries caused by its negligence in performing the contract. Contracts of this character lie outside the purpose of the statutes, and should not be held to embrace services which common carriers have never been obligated to perform, but which they have rendered to the public from time to time under special contracts. Since a railroad company is not bound as a common carrier to furnish facilities for loading freight at points between stations, it may grant that privilege to one person to the exclusion of all others. Thus the fact that a railroad company had for a long time allowed private individuals to engage in the business of loading logs at points between stations, and that plaintiff had built up a profitable business under that arrangement, does not give plaintiff any right to insist that it be continued, and he cannot object that the railroad company thereafter gave another the exclusive license to load logs between stations.

That published tariffs for private carrier service are unnecessary is asserted in *Roberts on Federal Liabilities of Carriers* (1929), 2d Ed., Vol. 1, at Sec. 310, where it is said:

> The provisions of the statute prohibiting departures from published tariffs are not binding upon a railroad company when it is acting outside the performance of its duties as a common carrier.

Upon both reason and authority private carrier activities and services are not required to be covered by published tariffs under Section 6. Published tariffs are for the guidance and protection of shippers and travelers who have the legal right to demand the services specified in the tariffs, upon the payment of the published rates. Private carrier service is not open to the public generally. No tariffs are necessary or appropriate. Shippers and travelers have no legal right to demand a private carrier service, because the railway company does not hold itself out as ready to perform the service for all alike who may apply.

Defendants' contention that the transportation of anything whatsoever coming within the definition of tangible "property" must be covered by published tariffs cannot be sustained. The Act providing for published tariffs was designed to regulate the transportation of persons and property which the carriers of the country hold themselves out to the public as ready to transport in their capacity as common carriers. Transportation services rendered in the capacity of a private carrier or bailee for hire, or bailee without hire, are outside the regulatory acts. Tariff provisions do not apply to them.

Numerous instances might be given of transportation services performed by carriers which are outside of their duties as common carriers. In those cases "property" is transported; but no one will contend for a moment that

such transportation without covering tariffs is a violation of Section 6. Some of these instances will now be referred to.

The carriers of the country are daily transporting a vast amount of express matter under contract with the express companies. This express matter is property. No tariffs are filed by the railway companies to cover the movement, because the transportation by the railways is not in their capacity of common carriers, but as private carriers, under contract (*Express Cases,* 117 U. S. 1.) Certainly, the railway companies in so doing are not violating the provisions of Section 6.

While locomotives and freight and passenger equipment coming from a manufacturer to the home line for use in transportation service are covered by tariffs, as the Commission points out in its report, the subsequent movements of such locomotives and equipment, in service or dead-head, over both home and foreign lines are not now, and never have been, covered by published tariffs. Of course, such locomotives and equipment constitute property of great value. If the movement of property requires a covering tariff, as defendants contend, then every such movement should be covered by tariffs, and all the carriers of the country are in daily violation of Section 6 by reason of their failure in that respect.

It is well known that freight cars pass over many lines in through movements under load, and likewise in returning empty; that privately owned freight equipment is in daily use over various railroads throughout the country; that passenger equipment in joint service is in constant use over the lines of two or more carriers, both when in service and when moving dead-head. There are no tariffs covering these movements. If, as defendants contend, all transporta-

tion of property must be covered by tariffs under Section 6, then the violations of that section are so vast in number as to almost reach astronomical figures.

The Commission itself in its report in this case fully recognizes that property represented by an office car, in some instances at least, may be transported without a covering tariff, since it impliedly authorizes a carrier to transport its own office cars over its own lines without complying with Section 6. True, it concludes that property represented by an office car when moving over a foreign line is property and must be covered by a tariff, and must move at tariff rates. The logical result of these two apparently conflicting conclusions is that an office car is property when moving over a foreign line, but not property when moving over the home line; that an office car becomes property at the junction point, when it leaves the home line and passes on to the foreign line; and that what is innocent up to the junction joint becomes a violation of law when that point has been passed. It is difficult to reconcile the Commission's conclusions. It seems fairly clear that if an office car is property on a foreign line, it is equally property on the home line. If its movement should be covered by tariff in one case, it would seem that a tariff is equally imperative in the other.

It is difficult, also, to reconcile the defendants' position in this case with the Commission's Conference Ruling with respect to astray shipments, pointed out in our original brief (p. 58). Such astray shipments naturally are property; but the Commission itself ruled that they may be moved to their proper destination without the assessment of additional charges and without the necessity of publishing, posting or filing any tariff to cover the movement.

The same may be said of the standard form of detour agreement (Exhibit C), by which the equipment of a carrier is moved over a foreign line in case of emergency, either with the power and crew of the home line, or with the power and crew of the foreign line. Such trains undoubtedly constitute "property"; but no one for a moment will contend that such detour movements should be covered by published tariffs.

Again, substantially all the carriers of the country transport United States mail, which is property; but no one would think of requiring a tariff for the movement of mail, since the carriers in transporting it act as private carriers.

Defendants' contention that any movement by a railway company of "property" must be covered by published tariffs under Section 6 is altogether too broad and sweeping to be accepted as a universal rule. No doubt, where a carrier holds itself out as a common carrier of specific property, tariffs must be filed covering the movement, advising the public of the rates, fares and charges, and all the conditions that affect either charges or service; but the very reason for the publication of tariffs covering common carrier service excludes the publication of tariffs for a private carrier service. The public is not interested in a private carrier service. Carriers do not offer to perform them for the public generally. They are under no legal obligation so to do. It is futile, therefore, for defendants to claim that a carrier moving an office car in its capacity as a private carrier is under legal obligations to file a tariff under Section 6 covering the movement.

IV.

The authorities relied upon by defendants are inapplicable because they deal with common carrier services performed under published tariffs.

Defendants contend that the ownership of property transported by a common carrier is no criterion by which to determine whether the service is that of a common carrier or private carrier, and they cite in support of their position *Interstate Commerce Commission* v. *Baltimore & Ohio R. Co.*, 225 U. S. 326.

We are unable to see that the case has the slightest bearing upon the issue before the Court. There the carriers had put into effect two published rates on coal; one rate covering "coal, on the one hand, consigned to a railroad company and coal, on the other hand, consigned to some other party". The two classes are called, respectively, "railroad-fuel coal" and "commercial coal". The rate on railroad-fuel coal was substantially less than the rate on commercial coal. The Commission held that this disparity in rates constituted a discrimination; and this ruling was upheld by this Court.

The distinction between that case and the one at bar is most obvious. There the railway companies held themselves out as common carriers of both classes of coal; their published tariffs covered both classes. They thereby assumed the legal obligation to carry both classes for all alike who should apply. Their obligation to transport either class at the instance of any shipper was a legal duty, and enforceable by court action. They were common carriers of both classes of coal, and, as such, the Commission had the right to say that the service and the conditions attend-

ing the transportation of the two classes of coal were so similar as to forbid a difference in tariff rates between the two. It is quite apparent, therefore, that neither the Commission nor the Court had before it any questions involving the performance by a carrier of any of its private carrier activities, nor the rules or principles applicable thereto.

They also cite *American Express Co.* v. *United States,* 213 U. S. 522, which is inapplicable, because it deals exclusively with the common carrier activities of the Express Company. The company held itself out as a common carrier of express matter for all alike. Its published tariffs were on file. The Commission, therefore, had complete jurisdiction over these common carrier activities. There was no question made in the case of any private carrier service, because there was none involved. The Court held that it was a discrimination under the Elkins Act to issue passes to a limited class for the transportation of express matter, with the result that the Express Company, while in the performance of its common carrier duties, would be carrying for some persons at a less rate than for others. The case dealt exclusively with discrimination with respect to common carrier activities.

Counsel also cite *Louisville & Nashville R. Co.* v. *Tennessee,* 262 U. S. 319. There, as in the other cases cited by defendants, the Court dealt with the common carrier activities of the companies involved. The State of Tennessee sought to set aside an order of the Commission which directed the removal of discrimination against interstate commerce brought about by lower intrastate rates on carload shipments of stone and gravel for use in the building of public highways and consigned to federal, state, county and municipal authorities. The lower rates had been put into effect by the state authorities.

Both the state rates and the interstate rates were published rates, duly filed. The railway company was admittedly a common carrier with respect thereto. The sole question presented was whether the lower state rates were discriminatory, as against interstate commerce; and it was held that they were. The Court was therefore dealing with a common carrier service, over which the Commission had jurisdiction. The question of private carrier service was not involved in the case, and was not considered.

The other authorities upon which defendants rely also deal with common carrier activities. They cite no decision dealing with private carrier activities of railway companies.

V.

The Commission has no authority by administrative order to convert a private carrier service into a common carrier service.

It is unnecessary to remind the Court that the authority of the Commission is wholly statutory, and that it cannot lawfully exceed the specific powers thus granted to it.

The manifold regulations embodied in the Interstate Commerce Act deal solely and exclusively with the common carrier activities of railway companies. There is nowhere in the entire Act any intimation whatsoever that Congress intended to delegate to the Commission any power of control or regulation over railway companies in the performance of their private carrier activities. It is entirely plain, therefore, that if the movement of an office car is a private carrier service, as we contend it is, then the Commission has no statutory power to interfere or impose any regulations whatsoever. The authorities which are cited *supra* also support this contention.

Furthermore, the power of the Commission or of any regulatory body is limited "to the undertaking which the carrier has expressly or impliedly assumed" (*Northern Pacific R. Co.* v. *North Dakota,* 236 U. S. 585, 595). The Court there adds:

> If it has held itself out as a carrier of passengers only, it cannot be compelled to carry freight.

Of course, the converse is true. A railway company may hold itself out as a carrier of freight only, and cannot be compelled to carry passengers (*Wiggins Ferry Co.* v. *East St. Louis R. Co.,* 107 Ill. 450). We called attention in our original brief (p. 43) to the decisions of this Court holding that a private carrier cannot be changed into a common carrier by any legislative fiat, or by any order of the Commission.

How, then, can the Commission by any order it may make convert a private carrier service in transporting office cars into a common carrier service? We earnestly contend that this cannot be done.

Finally, we invoke the rule that the power to regulate commerce is not absolute, but is subject to the limitations and guarantees of the Constitution among which are liberty of contract and the right of property, which, we contend, the Commission's order violates. In *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.,* decided January 5, 1931, this Court said:

> The power to regulate commerce is not absolute, but is subject to the limitations and guarantees of the Constitution, among which are those providing that private property shall not be taken for public use without just compensation and that no person shall be deprived of life, liberty or property without

due process of law. Monongahela Navigation Co. *v.* United States, 148 U. S. 312, 336; United States *v.* Joint Traffic Association, 171 U. S. 505, 571-572; Adair *v.* United States, 208 U. S. 161, 180. Both the liberty of contract and the right to property here are involved.

Plaintiffs claim the protection of these constitutional guaranties. They claim the right to use their property in the manner in which the property has been used for many decades. They claim the right to contract with other carriers in reference to the movement of their office cars and the office cars of other carriers in the same manner as that right has always been exercised. They earnestly and confidently contend that this right cannot be destroyed by an administrative order of the Commission, commanding carriers to cease the performance of a private carrier service, or, in the alternative, to convert it into a common carrier service subject to public regulation.

Respectfully submitted,

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